

D.P.U. 96-45-A

Petition of the Massachusetts Municipal Wholesale Electric Company for Authority Under G.L. c. 164, § 72A to Enter Upon Lands to Survey

APPEARANCES: Nicholas J. Scobbo, Jr., Esq.
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One Beacon Street
Boston, Massachusetts 02108
FOR: MASSACHUSETTS MUNICIPAL WHOLESALE
ELECTRIC COMPANY
Petitioner

I. INTRODUCTION

On April 24, 1996, Massachusetts Municipal Wholesale Electric Company ("MMWEC" or "Company") filed a petition with the Department of Public Utilities ("Department") seeking authority under G.L. c. 164, § 72A to enter upon land in the towns of Ludlow, Wilbraham, Hampden, Monson and Palmer for the purpose of making a survey of proposed natural gas pipeline routes, preliminary to eminent domain proceedings.

MMWEC is proposing to construct a 15-mile, 16-inch natural gas pipeline from its Stony Brook Energy Center power plant in Ludlow to a point of connection with the Tennessee Gas Pipeline Company interstate pipeline in southern Massachusetts (Petition at 2). MMWEC states that the purpose of the pipeline "is to provide quantities of natural gas sufficient to enable the [Stony Brook power plant] to operate more frequently (if not entirely) on natural gas, resulting in both economic benefits associated with lower fuel costs and a reduction in emissions from the plant" (id.).

MMWEC has identified a primary and an alternative corridor (or route) for the proposed pipeline (Petition, Exh. A). The primary corridor runs through the towns of Ludlow, Wilbraham and Hampden; the alternative corridor runs through the towns of Palmer, Ludlow, Wilbraham and Monson (id.). The Company states that "[t]o determine the placement of the final [forty-foot

wide pipeline] right-of-way within the 3000 feet wide corridors [sic], and to determine the lands which may be subject to MMWEC's power of eminent domain,¹ it is necessary to enter temporarily upon the private lands comprising the corridors to conduct surveys and other field studies" (Petition at 4).

On July 18, 1996, the Department issued an order authorizing MMWEC to enter upon and survey the property of 13 landowners in Ludlow, Wilbraham and Hampden, who had refused the Company permission.² Massachusetts Municipal Wholesale Electric Company, D.P.U. 96-45, at 5-6 (1996). The Department ordered that the "docket shall remain open for a reasonable period of time to allow the Company to supplement its petition should it determine [for certain specified reasons] the need to obtain Department approval to survey the lands of other property owners along the primary corridor." Id. at 7.

¹ MMWEC contends that c. 775, § 7 of the Acts of 1975 give the Company eminent domain powers and that, therefore, it is not necessary for MMWEC to petition the Department for authority to take land by eminent domain for construction of the pipeline (MMWEC's June 17, 1996 Letter to Hearing Officer at 2).

² The Department's approval was subject to "the following conditions: (1) no trees or timber shall be cut down or removed on the affected properties; (2) small brush may be cut down and removed on the affected properties, but only in areas where surveyors need to make a line of sight; (3) areas excavated for purposes of conducting archaeological surveys on the affected properties must be restored to a condition reasonably consistent with their condition before construction; (4) no blasting shall be conducted on any of the affected properties; and (5) the Massachusetts Municipal Wholesale Electric Company shall provide a copy of its petition and plans to any of the landowners listed in Appendix A that request a copy" Massachusetts Municipal Wholesale Electric Company, D.P.U. 96-45, at 6 (1996).

On July 11, 1996, MMWEC supplemented its petition with a request to survey the property of 13 additional landowners along the primary corridor in the towns of Ludlow, Hampden and Wilbraham.

General Laws c. 164, § 72A authorizes the Department to grant an electric company authority to enter private lands for the purpose of making a survey preliminary to eminent domain proceedings.³ The Department may grant such permission without notice and hearing. Carlisle v. Department of Public Utilities, 353 Mass. 722 (1968). In acting on this petition, the Department exercised its discretion on the question of notice and hearing by mailing notice of this proceeding to all landowners upon whose land the Company has petitioned for authority to enter (see Appendix A). This notice, dated July 11, 1996, provided that property owners could submit comments on the petition to the Department by July 19, 1996. The Department received comments from the following landowners: Kenneth G. Pyzocha on behalf of Walter Pyzocha; Sharon Lee; Shirley L. Evans; Michael and Roxanne Avdoulos; Robert J. Croken; Eleanor M. Jaciow; and Victoria Longtine.

The comments reflected landowners' opposition to the proposed route, including the need for the pipeline, and concerns about perceived negative impacts of the proposed pipeline project. Mr. Pyzocha, Ms. Evans and Mr. Croken also had comments specific to the survey petition.

Mr. Pyzocha stated that the surveyors had cut saplings on forest land adjacent to his family's land and had placed metal spikes in trees on his family's property, even though the

³ MMWEC is an electric company to which the statute applies. See St. 1975, c. 775, § 19.

Pyzochas had not given permission to enter the land (Pyzocha Letter). Mr. Pyzocha suggested that if the Department decided to give MMWEC permission to survey, such permission should be subject to the following conditions: (1) no damage to the land; (2) 48 hours prior notice before surveying; (3) a specified date and time for the surveying, and no slippage; (4) allowing the property owner to be present during the surveying; and (5) providing property owners with a copy of the survey results (id.).

Ms. Evans raised concerns that the surveying of her property could disturb Indian burial grounds, that “clearing and boring activities” necessary for line of sight surveying would endanger the wildlife, forests and wetlands, and could lead to more trespassing and hunting on her land, and that survey activities could damage the lower section of her sheep pasture (Evans Letter).

Mr. Croken objected to what he considered an “unreasonable” deadline for filing comments (Croken Letter). He also argued that for the Department to allow MMWEC to survey his land would be “a violation of my fundamental rights, be disruptive to me personally and possibly to my health, and unsettling to the habitat that I have taken great care to cultivate” (id.).

II. ANALYSIS AND FINDINGS

Before the Department makes a determination on the Company's petition filed under G.L. c. 164, § 72A, the Department considers the comments submitted by the affected landowners. The Department finds that the commenters have not raised sufficient reasons to deny the Company authority to survey their land, pursuant to § 72A, and that their concerns can be adequately addressed by the conditions placed on MMWEC in the Department's first Order in this case and the additional conditions that follow, which are intended to limit the intrusion of the

survey process on landowners' property. Besides the conditions set forth in the Department's first Order in this case, in conducting its survey activities, MMWEC shall not disturb man-made structures, including buildings, fences, stone walls; and shall make a reasonable effort to arrange with the landowners a mutually convenient date and time that their land will be surveyed so that they may observe the surveying. In response to certain inquiries the Department has received, the Department finds it necessary to clarify the condition, set forth in the Department's first Order in this case, that "small brush may be cut down and removed on the affected properties, but only in areas where surveyors need to make a line of sight." See Massachusetts Municipal Wholesale Electric Company, D.P.U. 96-45, at 6 (1996). The term "small brush" includes small saplings, but they may be cut down only when there is no other way to make a line of sight. Finally, the Department reminds MMWEC and property owners that under § 72A, MMWEC remains liable to property owners for any damage caused to their property as a result of the surveying.

Accordingly, the Department finds the Company's petition to be appropriate as a necessary preliminary activity incident to the proposed pipeline project. The Company is granted authority to enter those lands listed in Appendix A, subject to the conditions enumerated in Section III of this Order.

The Department's approval under § 72A does not constitute a judgment regarding the project itself or the need for or location of eminent domain takings. Consideration of, and findings regarding, the underlying project are reserved for the Company's later petitions to the Department and the Energy Facilities Siting Board. The Department will keep this docket open

for a reasonable period of time to allow MMWEC to supplement its petition should MMWEC identify additional land for which it is unable to obtain permission to survey.

III. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: That, for the purpose of making surveys and field studies in connection with the proposed Stony Brook/Tennessee Pipeline Project, as described in the Company's petition and attachments, Massachusetts Municipal Wholesale Electric Company, acting through its employees, agents, and representatives, is authorized to enter upon the lands of those persons listed in the attached Appendix A; and it is

FURTHER ORDERED: That the Massachusetts Municipal Wholesale Electric Company comply with the following conditions: (1) no trees or timber shall be cut down or removed on the affected properties; (2) small brush may be cut down and removed on the affected properties, but only in areas where surveyors need to make a line of sight; (3) areas excavated for purposes of conducting archaeological surveys on the affected properties must be restored to a condition reasonably consistent with their condition before construction; (4) no blasting shall be conducted on any of the affected properties; (5) no man-made structures, including buildings, fences and stone walls shall be disturbed; (6) the Massachusetts Municipal Wholesale Electric Company shall make a reasonable effort to arrange with the landowners a convenient date and time that their property will be surveyed so that the landowners may observe the surveying; and (7) the Massachusetts Municipal Wholesale Electric Company shall provide a copy of its petition and plans to any of the landowners listed in Appendix A that request a copy; and it is

FURTHER ORDERED: That the Massachusetts Municipal Wholesale Electric Company shall transmit a copy of this Order, by certified mail, to the landowners listed in the attached Appendix A at least five days prior to any entry upon the affected properties; and shall certify to the Department no later than 14 calendar days following transmittal of this Order to all the landowners that such transmission has been accomplished; and it is

FURTHER ORDERED: That within three days of the date of this Order, the Massachusetts Municipal Wholesale Electric Company shall serve a copy of this Order on the selectmen of the towns of Ludlow, Wilbraham, Hampden, Palmer and Monson, and place a copy of this Order in the libraries of those towns for public inspection; and it is

FURTHER ORDERED: That this docket shall remain open for a reasonable period of time to allow the Massachusetts Municipal Wholesale Electric Company to supplement its petition should it determine the need to obtain Department approval to survey the lands of other property owners along the primary corridor.

By Order of the Department,

John B. Howe, Chairman

Mary Clark Webster, Commissioner

Janet Gail Besser, Commissioner

APPENDIX A

LANDOWNERS TO WHOM NOTICE WAS SENT

Edward Carter
4610 Britcastle Drive
St. Louis, MO 63128

Michael W. and Roxanne B. Avdoulos
Box 302
Scantic Road
Hampden, MA 01036

Stephen A. and Barbara C. Black
502 Glendale Road
Wilbraham, MA 01095

Shirley L. Evans
478 Glendale Road
Wilbraham, MA 01095

Walter Pyzocha
287 Ventura Street
Ludlow, MA 01056

Jeffrey A. Lefferts
P.O. Box 804
Wilbraham, MA 01095

Frank J. and Elizabeth A. Zucco
Donald H. and Josephine T. Zucco
27 Deepwoods Drive
Longmeadow, MA 01106

Natalie Pyzocha Life Estate
Remainder Kenneth, Stanley, Jr., Ernest
Walter and Roger B. Pyzocha
142 Chapin Street
Ludlow, MA 01056

Robert J. and Francis Croken
251 Crane Hill Road
Wilbraham, MA 01095

Victoria Longtine
3121 Boston Road
Wilbraham, MA 01095

Harold C. and Sharon J. Lee
3116 Boston Road
Wilbraham, MA 01095

Samuel J. and Eleanor M. Jaciow
799 Center Street
Ludlow, MA 01056

Eileen G. Fillion
442 Miller Street
Ludlow, MA 01056

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).